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IN THE

Supreme Court of the United States

October Term 1974

No. 74-1624

THE STATE OF NEW YORK,

Petitioner,

v.

RITSO DAVIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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INDEX

	PAGE
History of the Case	1
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Constitutional Provisions at Issue	3
Statement of Facts	4
Summary of Argument	6
POINT I—Under the totality of the circumstances herein, there was probable cause for the Respondent's arrest. The seizure of the purse was proper as having been made incidental to a lawful arrest	7
POINT II—The Court of Appeals below ruled that there was no probable cause for Respondent's arrest solely because there was a possible innocent explanation for his conduct. In so doing, the Court so seriously misconstrued the standard of the Fourth Amendment as to make this case worthy of review by the Supreme Court	15
CONCLUSION	24
APPENDIX:	
A—Order Appealed From	1a
B—Order of Reversal of the Appellate Division	2a
C—Opinion of the Appellate Division, Second Department	3a
D—Opinion of the Court of Appeals	11a

TABLE OF AUTHORITIES

Cases

PAGE

Adams v. *Williams*, 407 U.S. 143 (1972) 8, 13

Beck v. *Ohio*, 379 U.S. 89 (1964) 7, 8, 20

Bell v. *United States*, 254 F. 2d 82 (D.C. Cir. 1958), *cert. denied* 358 U.S. 885 .....7, 9, 10, 11, 12

Brinegar v. *United States*, 338 U.S. 160 (1949), *reh. denied* 338 U.S. 839 8

California v. *Green*, 399 U.S. 149 (1970) 2

Carroll v. *United States*, 267 U.S. 132 (1925) 8

Coleman v. *United States*, 420 F. 2d 616 (D.C. Cir. 1969) 11

De Bruhl v. *United States*, 199 F. 2d 175 (D.C. Cir. 1952), *cert. denied* 344 U.S. 868 14

Draper v. *United States*, 358 U.S. 307 (1959) 8

Henry v. *United States*, 361 U.S. 98 (1959) 8, 9, 10

Jackson v. *United States*, 302 F. 2d 194 (D.C. Cir. 1962) 9

Ker v. *California*, 374 U.S. 23 (1963) 14

Mapp v. *Ohio*, 367 U.S. 643 (1961) 24

McCray v. *Illinois*, 386 U.S. 300 (1967) 9

Morrison v. *United States*, 491 F. 2d 344 (8th Cir. 1974) 12

PAGE

Oregon v. *Hass*, — U.S. —, 95 S. Ct. 1215 (1975) ..2, 15, 23

People v. *Abdelah*, 41 App. Div. 2d 667, 341 N.Y.S. 2d 288 (2d Dept. 1973) 16

People v. *Brown*, 32 N.Y. 2d 172, 297 N.E. 2d 94, 344 N.Y.S. 2d 356 (1973) 16, 18, 20

People v. *Corrado*, 22 N.Y. 2d 308, 239 N.E. 2d 526, 292 N.Y.S. 2d 648 (1968) 17, 19, 20

People v. *Hunter*, 30 N.Y. 2d 774, 284 N.E. 2d 879, 333 N.Y.S. 2d 761 (1972) 16

People v. *Meyers*, 38 App. Div. 2d 484, 330 N.Y.S. 2d 675 (1st Dept. 1972) 16

People v. *Perel*, 34 N.Y. 2d 462, 315 N.E. 2d 452, 358 N.Y.S. 2d 383 (1974) 15

People v. *Powell*, 36 App. Div. 2d 177, 319 N.Y.S. 2d 485 (1st Dept. 1971), aff'd 30 N.Y. 2d 634, 282 N.E. 2d 333, 331 N.Y.S. 2d 445 16

People v. *Russell*, 34 N.Y. 2d 261, 313 N.E. 2d 732, 357 N.Y.S. 2d 415 (1974) 17, 18, 19, 20

People v. *Valentine*, 17 N.Y. 2d 128, 216 N.E. 2d 321, 269 N.Y.S. 2d 111 (1966), remittitur amended, 17 N.Y. 2d 869, 218 N.E. 2d 335, 271 N.Y.S. 2d 299 .. 16

Preston v. *United States*, 376 U.S. 364 (1964) 14

Rener v. *Beto*, 447 F. 2d 20 (5th Cir. 1971), *cert. denied* and appl. dism. 405 U.S. 1051 9

Sibron v. *New York*, 392 U.S. 40 (1968) 7, 10, 11

Smith v. *United States*, 358 F. 2d 833 (D.C. Cir. 1966), *cert. denied* 386 U.S. 1008 11

PAGE

Terry v. *Ohio*, 392 U.S. 1 (1967) 13

United States v. *Allen*, 472 F. 2d 145 (5th Cir. 1973) 13

United States v. *Bowers*, 458 F. 2d 1045 (5th Cir. 1972), *cert. denied* 409 U.S. 868 10

United States v. *Boston*, 330 F. 2d 937 (2d Cir. 1964), *cert. denied* 377 U.S. 1004 14

United States v. *Brown*, 463 F. 2d 949 (D.C. Cir. 1972) 10, 14, 21–23

United States v. *Canuso*, 470 F. 2d 1224 (2d Cir. 1972) 12–13

United States v. *Davis*, 458 F. 2d 819 (D.C. Cir. 1972) 7, 10, 12

United States v. *Devenere*, 332 F. 2d 160 (2d Cir. 1964) 13

United States ex rel. Farrugia v. *Bhono*, 256 F. Supp. 391 (S.D.N.Y. 1966) 9, 14

United States v. *Gorman*, 355 F. 2d 151 (2d Cir. 1965), *cert. denied* 384 U.S. 1024 14

United States v. *Gonzalez*, 362 F. Supp. 415 (S.D. N.Y. 1973) 9, 10

United States ex rel. Griffin v. *Vincent*, 359 F. Supp. 1074 (S.D.N.Y. 1973) 11, 13

United States v. *Hill*, 340 F. Supp. 344 (E.D. Pa. 1972) 13

United States v. *Jones*, 352 F. Supp. 369 (S.D. Ga. 1972), aff'd 481 F. 2d 1402 23–24

United States v. *Loundmannz*, 472 F. 2d 1376 (D.C. Cir. 1972), *cert. denied* 410 U.S. 957 14

PAGE

United States v. *Mapp*, 476 F. 2d 67 (2d Cir. 1973) 9

United States v. *Matlock*, 415 U.S. 164 (1974) 9

United States v. *Moon*, 351 F. 2d 464 (2d Cir. 1965), *cert. denied*, 383 U.S. 929 14

United States v. *Moore*, 459 F. 2d 1360 (D.C. Cir. 1972) 12

United States v. *Peep*, 490 F. 2d 903 (8th Cir. 1974) 7, 10, 11, 12

United States v. *Rabinowitz*, 339 U.S. 56 (1950) 11

United States v. *Rickus*, 351 F. Supp. 1379 (E.D. Pa. 1972) aff'd 480 F. 2d 918, *cert. denied*, 414 U.S. 1006 11, 12

United States v. *Robinson*, 414 U.S. 218 (1973) 14

United States v. *Saka*, 339 F. 2d 541 (3rd Cir. 1964) 14

United States v. *Sanders*, 462 F. 2d 122 (6th Cir. 1972) 10

United States v. *Solis*, 469 F. 2d 1113 (5th Cir. 1972) *cert. denied* 410 U.S. 932 9

United States v. *Tramunti*, — F. 2d —, (2d Cir. 1975), 16 Cr. L. 2543 (decided March 7, 1975) 12

United States v. *Wai Lau*, 329 F. 2d 310 (2d Cir. 1964) *cert. denied* 379 U.S. 856 11

Weeks v. *United States*, 232 U.S. 383 (1914) 14

Statutes

PAGE

PENAL LAW OF NEW YORK

§ 220.05 (Consolidated Laws of New York, Book 39, McKinney's 1967) (repealed by Laws of New York, 1973c. 276 § 18) 1

CRIMINAL PROCEDURE LAW OF NEW YORK

§ 140.10[1] (Consolidated Laws of New York, Book 11A, McKinney's 1971) 15

New York State Constitution

ARTICLE I

Section 12 15

United States Constitution

FOURTH AMENDMENT 3, 7, 12, 13, 15

FOURTEENTH AMENDMENT 3

IN THE

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No.

THE STATE OF NEW YORK,

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v.

RITSO DAVIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

History of the Case

By Kings County Indictment No. 7398/1972, filed on September 26, 1972, Respondent, Ritso Davis, was accused of the crime of Criminal Possession of Dangerous Drugs in the Fourth Degree.* On March 12, 1973, after a pretrial hearing, an order was entered by the Supreme Court, Kings County, suppressing the use at trial of certain evidence, "to wit 18 glassine envelopes including contents and a purse" (Aaron E. Koota, J.) (see Appendix A, *infra*).

Petitioner appealed from the aforementioned order to the Appellate Division for the Second Judicial Department

* Penal Law of New York § 220.05 (Consolidated Laws of New York, Book 39, McKinney's 1967) (repealed by Laws of New York, 1973 c. 276 § 18).

of New York. By an order, dated April 22, 1974, that court, upon an opinion by Justice John P. Cohalan, Jr., unanimously reversed the suppression order and directed that Respondent's motion to suppress be denied (see Appendix B, *infra*).

Thereafter, by permission of Hon. Charles D. Breitel, Chief Judge of the Court of Appeals of New York, Respondent appealed from the order of the Appellate Division. On March 26, 1975, a judgment was entered by which the Court of Appeals, upon an opinion by Associate Judge Lawrence H. Cooke, unanimously reversed the order of the Appellate Division and directed that the suppression order of the Supreme Court be reinstated.

Petitioner now applies for a Writ of Certiorari to the Court of Appeals of New York to review the aforementioned judgment of that court.

Opinions Below

The opinion of the Appellate Division, Second Department, below is reported at 44 App. Div. 2d 281, 354 N.Y.S. 2d 667 (see Appendix C, *infra*). The opinion of the Court of Appeals below is reported at 36 N.Y. 2d 280, —— N.E. 2d 367, —— N.Y.S. 2d 256 (see Appendix D, *infra*).

Jurisdiction

The jurisdiction of this Court to issue the Writ of Certiorari sought herein is conferred by 28 U.S.C. 1257(3). See, *e.g.*, *Oregon* v. *Hass*, —— U.S. ——, ——, 95 S. Ct. 1215, 1220 (1975); *California* v. *Green*, 399 U.S. 149 (1970).

Questions Presented

1. Whether a uniformed officer, trained in the detection of drug offenses, who observes what he believes to be glassine envelopes in a purse held by a reputed narcotics dealer, in a drug infested neighborhood, has probable cause to arrest when upon his approach the suspect suddenly passes the purse to another who has no apparent connection with him.

2. Whether by finding an absence of probable cause solely on the grounds that "[Respondent's] actions are susceptible of innocent explanation," the Court of Appeals has so significantly misconstrued the Fourth Amendment as to make this case worthy of review by the Supreme Court.

Constitutional Provisions at Issue

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, . . .

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

Statement of Facts

Patrolman Stanley Hackett, shield #30199, a member of the New York City Housing Department Police and the sole witness at the suppression hearing below, was assigned to the Marcy Projects in Brooklyn, New York, in August, 1972. Prior to the date of the incident herein, he had taken a course from the Housing Police regarding the recognition and packaging of heroin. He had personally made between five and ten arrests involving that drug and had assisted in some twenty-five others. In most of those instances, the heroin had been packaged in small glassine envelopes.

On August 25, 1972, at approximately 6:30 p.m., Hackett, in uniform, was conversing with a detective in front of the Housing Police Office at 492 Marcy Avenue, Brooklyn, New York. As a result of an arrest that had just been made, a small crowd of civilians had gathered around the Office.

Hackett glanced into the crowd and noticed the Respondent, Ritso Davis, standing some ten feet from him. The officer knew the Respondent by name and had received information from other police officers and neighborhood residents to the effect that he was a dealer in narcotics. Indeed the neighborhood was well-known as a high-crime area wherein the trafficking of dangerous drugs was common.

At this time, Respondent was simply standing in the street holding a red and white polka dot purse with a zipper top. Hackett took no action. He continued his conversation with the detective while keeping the Respondent under observation. The officer and the Respondent maintained those positions for the next five or ten minutes. Throughout that time, the Respondent continued to hold the purse without ever letting it out of his grasp.

Then, the Respondent opened the zipper top of the purse and withdrew some matches. Hackett and the detective began walking directly towards the Respondent observing what Hackett believed to be glassine envelopes inside the open purse near the zipper.

Inquiry into this observation was made by defense counsel on cross-examination at the suppression hearing:

> Q. Could you tell whether this was a candy wrapper? A. It appeared to be glassine envelopes.
>
> Q. It appeared to be a glassine envelope, but you didn't know whether or not it was a candy wrapper *which is also made of glassine paper?*
>
> [Interruption by Court]
>
> * * *
>
> Q. So you couldn't tell what if anything was in this plastic type paper that you were looking at, could you? A. If anything was inside?
>
> Q. Yes. All I could see was the white.
>
> Q. You saw now—now you're telling what appeared to be a glassine envelope— A. Yes.
>
> Q. —with white in it? A. No, the glassine envelope is white.
>
> Q. Is white? A. It is white in a sense.
>
> Q. But there's no way that you or—you couldn't see whether or not it was a glassine envelope or a candy wrapper, could you? A. I couldn't distinguish the two at that time, but it appeared to me to be glasine [sic] envelopes or the wrapper of a Hershey bar.

However, because he *believed* that what he saw was the type of glassine envelopes used in the packaging, sale, and distribution of heroin, Hackett continued his direct approach. As the uniformed officer closed to within three

feet of the Respondent, the latter suddenly passed the purse to a woman, later identified as Shiela MacMichaels, who was standing nearby. The woman had until that moment been unnoticed by the officer and had not spoken or had any apparent connection with the Respondent. She accepted the purse without comment. At no time did the officer lose sight of the purse.

Observing this exchange, Hackett and the detective immediately seized the purse and arrested Ms. MacMichaels and the Respondent. The purse was examined and found to contain a key, subsequently misplaced, and eighteen glassine envelopes containing white powder later identified as heroin. Both Respondent and the woman denied ownership of the purse and its contents.*

Summary of Argument

Petitioner contends that the totality of the circumstances with which Officer Hackett was faced, when taken together with his knowledge, training and experience, gave him probable cause to arrest the Respondent. The seizure of the heroin was therefore incidental to a lawful arrest and hence there was no constitutional bar to its admission as evidence against the Respondent.

Further, Petitioner submits that the holding of the Court of Appeals below represents the culmination of a relatively new trend wherein that Court has come to rule that as a requisite to a finding of probable cause to arrest, there must be no discernible innocent explanation for a suspect's actions. In so doing, the Court of Appeals has

* An Assistant District Attorney subsequently determined that there was insufficient evidence upon which to charge Ms. MacMichaels with a crime. He therefore directed that no complaint be filed against her.

significantly misconstrued the requirements of the Fourth Amendment and placed New York at odds with other jurisdictions on the question. While New York may impose more severe restrictions on the activity of its police than the Constitution demands, it may do so only on the basis of its own laws and not as a matter of federal constitutional law. The Supreme Court should therefore correct the erroneous test established under the Fourth Amendment by the Court of Appeals herein and should reverse and remand the case to that court for further consideration under State law.

POINT I

Under the totality of the circumstances herein, there was probable cause for the Respondent's arrest. The seizure of the purse was proper as having been made incidental to a lawful arrest.

A warrantless arrest is constitutionally permissible if made upon probable cause to believe that a suspect has committed a crime. *Sibron* v. *New York*, 392 U.S. 40, 64 (1968); *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964). The nature of probable cause for an arrest is a subject upon which the courts of this nation, both Federal and State, have spoken on innumerable occasions. What can be culled from the much that has been written on the question is that probable cause is a combination of factors, which are rarely sufficient in themselves, but which, when taken together, are enough to reasonably persuade a prudent police officer that a crime has been or is being committed. See, *e.g.*, *United States* v. *Peep*, 490 F. 2d 903, 907 (8th Cir. 1974); *United States* v. *Davis*, 458 F. 2d 819 (D.C. Cir. 1972); *Bell* v. *United States*, 254 F. 2d 82, 87 (D.C. Cir. 1958), *cert. denied* 358 U.S. 885.

Perhaps the best explanation of the constitutional standard of probable cause appears in *Brinegar* v. *United States,* 338 U.S. 160, 175-176 (1949), *reh. denied* 338 U.S. 839:

> In dealing with probable cause, . . ., as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt". . . . And this "means less than evidence which would justify condemnation" or conviction. . . . Probable cause exists where "the facts and circumstances within [the officers'] knowledge, and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed . . . (citations omitted)

See, also, *Adams* v. *Williams,* 407 U.S. 143, 149 (1972); *Beck* v. *Ohio, supra* at 91; *Henry* v. *United States,* 361 U.S. 98, 102 (1959); *Draper* v. *United States,* 358 U.S. 307 (1959); *Carroll* v. *United States,* 267 U.S. 132 (1925).

It is of course obvious that when a suspect is observed in the actual commission of a crime, probable cause for his arrest is made out. However, the cases through which the standard of probable cause has evolved have dealt with somewhat ambiguous rather than with clear-cut situations. As a result, reviewing courts were compelled to identify certain factors to which consideration would be given in determining whether, in light of formulated general definitions, probable cause had been established in a particular case. These factors, while neither necessary nor sufficient for a finding of probable cause, are held to be highly significant to the determination of its existence.

One such factor is any relevant information which the arresting officer may have about the person to be arrested. Thus, where an officer knows the prospective defendant as one who has, or is believed to have, previously engaged in the type of criminal activity for which an arrest is contemplated, it is more likely that such person's conduct will be found to establish probable cause than where he is unknown to the officer. See, *e.g., Henry* v. *United States, supra* at 103; *United States* v. *Mapp,* 476 F. 2d 67, 73 (2d Cir. 1973); *United States* v. *Solis,* 469 F. 2d 1113, 1115 (5th Cir. 1972), *cert. denied* 410 U.S. 932; *Rener* v. *Beto,* 447 F. 2d 20 (5th Cir. 1971), *cert. denied* and appl. dism. 405 U.S. 1051; *United States* v. *Gonzalez,* 362 F. Supp. 415, 422 (S.D.N.Y. 1973). In this regard, "[r]umor, gossip, common conversation, general reputation, hearsay, all these may well go into the police evaluation of the total situation which confronts them." *Jackson* v. *United States,* 302 F. 2d 194, 197 (D.C. Cir. 1962). See, also, *United States* v. *Matlock,* 415 U.S. 164 (1974); *McCray* v. *Illinois,* 386 U.S. 300 (1967).

Also significant is the background of the officer making the arrest. Probable cause will more readily be found where an officer has training, experience or expertise in the detection of the type of offense for which the arrest is made than where he possesses no such specialized knowledge. See, *e.g. United States* v. *Mapp, supra* at 73; *Rener* v. *Beto, supra; Bell* v. *United States,* 254 F. 2d 82 (D.C. Cir. 1958), *cert. denied* 358 U.S. 885; *United States ex rel. Farrugia* v. *Bhono,* 256 F. Supp. 391, 394 (S.D.N.Y., 1966).

Indeed, "[a]n officer experienced in the narcotics traffic may find probable cause in the smell of drugs and the appearance of paraphernalia which to the lay eye is without significance. His action is not measured by what might be probable cause to an untrained civilian passerby." *Bell* v. *United States, supra* at 86.

Another factor to be considered is the geographical area in which an arrest is made. It is more likely that probable cause will be established when the activity prompting the arrest is carried out in an area known for the frequency with which similar criminal conduct occurs than where such activity is relatively rare. See, *e.g., United States* v. *Brown,* 463 F. 2d 949, 950 (D.C. Cir. 1972); *United States* v. *Davis,* 458 F. 2d 819, 821 (D.C. Cir. 1972); cf. *United States* v. *Gonzalez,* 362 F. Supp. 415, 421 (S.D.N.Y. 1973). Certainly "the syndrome of criminality in those [high crime] areas cannot realistically go unnoticed by the judiciary." *United States* v. *Davis, supra,* at 821.

Also worthy of strong consideration in the determination of probable cause is the response of a suspect to initial contact with authorities. Evasive answers to legitimate questions and flight or deliberately furtive action taken at the approach of police or strangers are highly significant. See, *e.g., Sibron* v. *New York, supra,* 392 U.S. 40, 66-67 (1968); *Henry* v. *United States, supra,* at 103; *United States* v. *Peep, supra,* 490 F. 2d 903, 906 (8th Cir. 1974); *United States* v. *Sanders,* 462 F. 2d 122 (6th Cir. 1972); *United States* v. *Bowers,* 458 F. 2d 1045 (5th Cir. 1972), *cert. denied* 409 U.S. 868.

Thus, in sum, as Chief Justice Burger (then Circuit Judge) once aptly observed:

> . . . probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know and what they observe as trained officers. We weigh not individual layers but the "laminated" total. *Smith* v. *United States,* 358 F. 2d 833, 837 (D.C. Cir., 1966), *cert. denied* 386 U.S. 1008.

In weighing these "layers of information," the courts will judge each case on its own peculiar factual make-up. *Sibron* v. *New York, supra* at 59; *United States* v. *Rabinowitz,* 339 U.S. 56, 63 (1950); *United States* v. *Wai Lau,* 329 F. 2d 310, 311 (2d Cir. 1964) *cert. denied* 379 U.S. 856. With all of these considerations in mind then, we turn to the case at bar.

Officer Hackett had both training and extensive experience in the detection of narcotics offenses. He was especially knowledgeable with respect to the means by which heroin is packaged for distribution and use. He knew the Respondent by name and had received information, albeit unverified, that Respondent was a purveyor of dangerous drugs. He made his observations in what he knew to be a narcotics-ridden neighborhood.

Petitioner submits that the significance of what Hackett saw must be viewed as if through his eyes with all the knowledge and experience that was his at the time. *United States* v. *Peep, supra,* at 906; *Coleman* v. *United States,* 420 F. 2d 616 (D.C. Cir. 1969); *Jackson* v. *United States, supra,* 302 F. 2d 194, 196 (D.C. Cir. 1962); *Bell* v. *United States, supra,* 254 F. 2d 82, 87 (D.C. Cir. 1958), *cert. denied* 358 U.S. 885; *United States ex rel. Griffin* v. *Vincent,* 359 F. Supp. 1074, 1076 (S.D.N.Y. 1973); *United States* v. *Rickus,* 351 F. Supp. 1379, 1383 (E.D. Pa. 1972) aff'd 480 F. 2d 918, *cert. denied* 414 U.S. 1006. In the last analysis, a judg-

ment must be made as to whether Hackett's reactions were those of a reasonable and prudent police officer standing in his position knowing what he knew, and seeing what he saw. See, *e.g., United States* v. *Peep, supra,* at 906; *United States* v. *Davis, supra,* 458 F. 2d 819, 821 (D.C. Cir. 1972); *Bell* v. *United States, supra,* at 85-86.

At a distance of ten feet, Hackett spotted the Respondent who was holding a purse. This somewhat unusual sight provoked no response from the officer. Indeed, at this point, none was warranted. Five or ten minutes passed during which Hackett merely kept the Respondent under observation.

Then Respondent opened the purse to get matches and thereby revealed the presence of glassine material. It is true that Hackett could not conclusively rule out the possibility that what he took for and believed to be the notorious glassine envelopes, so closely connected with heroin traffic, was merely a wrapper of a candy bar, which, as defense counsel conceded below are "also made of glassine paper." However, the Constitution does not require an officer to conduct a trial on the street, for the Fourth Amendment speaks of *probable* cause and not certainties. See, *e.g., United States* v. *Tramunti,* —— F. 2d ——, —— (2d Cir. 1975), 16 Cr. L. 2543, 2544 (decided March 7, 1975); *Morrison* v. *United States,* 491 F. 2d 344, 346 (8th Cir. 1974); *United States* v. *Moore,* 459 F. 2d 1360, 1362 (D.C. Cir. 1972); *United States* v. *Rickus, supra,* at 1383. Indeed, petitioner submits that had Hackett been *certain* that what he saw in the possession of the drug seller were in fact glassine envelopes, no further inquiry would now be required since probable cause to arrest would have been clearly established. See, *e.g., United States* v.

Canuso, 470 F. 2d 1224, 1228 (2d Cir. 1972); *United States* v. *Devenere,* 332 F. 2d 160, 161 (2d Cir. 1964).

As circumstances stood here, Hackett, at the very least, had the right, if not the duty, to investigate the suspicious possession of the glassine material. *Adams* v. *Williams,* 407 U.S. 143, 146 (1972); *Terry* v. *Ohio,* 392 U.S. 1 (1967); *United States* v. *Allen,* 472 F. 2d 145, 147 (5th Cir. 1973). He decided to directly approach the Respondent. He was clearly entitled to do so for "[n]o one is protected by the Constitution against the mere approach of police officers in a public place." *United States* v. *Hill,* 340 F. Supp. 344 (E.D. Pa. 1972). As this Court has held, "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams* v. *Williams, supra,* at 145. See, also, *United States ex rel. Griffin* v. *Vincent,* 359 F. Supp. 1074, 1075 (S.D.N.Y. 1973).

When the officer, still believing he was viewing glassine envelopes, reached a point about three feet from the Respondent, the latter took the furtive action which we submit was the final element removing any constitutional objection to his arrest. Respondent, faced with the approaching uniformed police officer, now only three feet away, decided to rid himself of the contraband. He took the purse which he had not let slip from his grasp for the preceding five or ten minutes and passed it away to a woman standing nearby with whom he had had no apparent previous connection.

Petitioner submits that the Respondent's sudden abandonment, upon the approach of a uniformed officer, of the purse he had held throughout the past several minutes, gave Hackett reasonable grounds to conclude that what he

believed to be glassine envelopes in the possession of the reputed drug seller were indeed drug-filled glassine envelopes and not the innocent glassine wrapper of a candy bar. See, *e.g., United States* v. *Loundmannz,* 472 F. 2d 1376 (D.C. Cir. 1972), *cert. denied* 410 U.S. 957; *United States* v. *Brown, supra,* 463 F. 2d 949 (D.C. Cir. 1972); *United States* v. *Saka,* 339 F. 2d 541 (3d 1964); *United States* v. *Moon,* 351 F. 2d 464, 465 (2d Cir. 1965), *cert. denied* 383 U.S. 929; *DeBruhl* v. *United States,* 199 F. 2d 175, 176 (D.C. Cir. 1952), *cert. denied* 344 U.S. 868; *United States ex rel. Farrugia* v. *Bhono,* 256 F. Supp. 391, 394 (S.D.N.Y. 1966).

Of course, Hackett could not be certain of this without further examination and, indeed, chemical analysis. However, under the totality of circumstances, he could feel satisfied that his conclusion was much more *probably* accurate than not. This being the essence of *probable* cause, the arrest that followed was lawful and having been so, the seizure made incidental thereto was likewise lawful. The narcotics seized therefore should have been admitted into evidence without constitutional objection. *United States* v. *Robinson,* 414 U.S. 218 (1973); *Preston* v. *United States,* 376 U.S. 364 (1964); *Ker* v. *California,* 374 U.S. 23 (1963); *Weeks* v. *United States,* 232 U.S. 383 (1914).*

* It is of course of no significance that the seizure may have slightly preceded the actual arrest since probable cause for the latter existed at the time of the former. *United States* v. *Gorman,* 355 F. 2d 151, 159-160 (2d Cir. 1965); *cert. denied* 384 U.S. 1024; *United States* v. *Boston,* 330 F. 2d 937, 939 (2d Cir., 1964), *cert. denied* 377 U.S. 1004; *United States ex rel. Farrugia* v. *Bhono, supra,* at 394.

POINT II

The Court of Appeals below ruled that there was no probable cause for Respondent's arrest solely because there was a possible innocent explanation for his conduct. In so doing, the Court so seriously misconstrued the standard of the Fourth Amendment as to make this case worthy of review by the Supreme Court.

As demonstrated in POINT I, *supra,* the holding of the Court of Appeals below was erroneous under federal constitutional law.* We realize that not every State case, wrongly decided under the Constitution, is deserving of review by the Supreme Court. It is Petitioner's submission, however, that the case at bar is worthy of review because it was decided by application of a standard, in the name of the Constitution, which is wholly repugnant to the Fourth Amendment thereof. The continued vitality of this aberrant standard will, in our view, place New York at

* That the court's holding herein was grounded on the Fourth Amendment is not open to question. While Article I, Section 12 of the Constitution of New York, in the precise language of the Fourth Amendment, protects citizens of this State against unreasonable searches and seizures, the right, under State law, to make a warrantless arrest is not derived from that provision. Rather, that right is secured to officers by statute. Under New York law, a warrantless arrest may be made upon *reasonable* cause to believe a crime has been committed (see Criminal Procedure Law of New York, § 140.10[1] [Consolidated Laws of New York, Book 11A, McKinney's, 1971]).

Although reasonable cause has been equated with probable cause, in the past, when the Court of Appeals has seen fit to ground a decision of this sort even in part upon State law, it has not hesitated in citing both the State Constitution and the statute. (See, e.g., *People* v. *Perel,* 34 N Y 2d 462, 465-466, 315 N.E. 2d 452, 455, 358 N.Y.S. 2d 383, 387-388 [1974].)

In the case at bar, the Court of Appeals made no reference to either the State Constitution or the statute. Further it employed the federal standard of *probable* cause rather than the State standard of *reasonable* cause. In so doing, the court clearly revealed the federal constitutional basis of its decision. See, *Oregon* v. *Hass, supra,* — U.S. —, —, 95 S. Ct. 1215, 1219-1220 (1975).

odds with other jurisdictions on this important issue, and indeed throw the constitutional law of arrest into chaos in this State.

Prior to the decision below, the Court of Appeals, and lower State Courts following its lead, had properly recognized the significance to a finding of probable cause of the circumstances which surrounded a suspect's conduct and affected the officer's judgment: *See, e.g., People* v. *Brown*, 32 N.Y. 2d 172, 297 N.E. 2d 94, 344 N.Y.S. 2d 356 (1973) [high-crime area, furtive conduct]; *People* v. *Hunter*, 30 N.Y. 2d 774, 284 N.E. 2d 879, 333 N.Y.S. 2d 761 (1972) [high-crime area]; *People* v. *Valentine*, 17 N.Y. 2d 128, 216 N.E. 2d 321, 269 N.Y.S. 2d 111 (1966), remittitur amended, 17 N.Y. 2d 869, 218 N.E. 2d 335, 271 N.Y.S. 2d 299 [expertise of officer]; *People* v. *Abdelah*, 41 App. Div. 2d 667, 341 N.Y.S. 2d 288 (2d Dept. 1973) [reputation of defendant]; *People* v. *Meyers*, 38 App. Div. 2d 484, 330 N.Y.S. 2d 675 (1st Dept. 1972) [expertise of officer]; *People* v. *Powell*, 36 App. Div. 2d 177, 319 N.Y.S. 2d 485 (1st Dept. 1971), aff'd 30 N.Y. 2d 634, 282 N.E. 2d 333, 331 N.Y.S. 2d 445 [reputation of defendant].

However, a trend began to develop quietly in the Court of Appeals in warrantless arrest cases. That trend, from which the erroneous standard applied below evolved, sought to minimize almost to the point of insignificance, the circumstances surrounding a suspect's conduct and to view that conduct in a clinical and abstract way.

Illusrative of this trend was *People* v. *Brown*, 24 N.Y. 2d 421, 248 N.E. 2d 867, 301 N.Y.S. 2d 18 (1969). There, the officer observed the defendant, whom he did not know, talking with a suspected narcotics addict, in a drug infested area. The addict walked into a building and returned to the defendant. The officer then observed a movement of hands and saw the two men part. The defendant was arrested and found to be carrying narcotics.

The Court of Appeals held that there had been no probable cause for the arrest, and we do not argue that that conclusion was inconsistent with the Constitution. The defendant had been unknown to the officer and nothing resembling contraband had been observed. The court noted the absence of a recurring pattern of conduct, of overheard conversation that might have clarified the observed acts, of flight at the approach of an officer and of misstatements made when the defendant was questioned. Then the court focused on the observed acts and laid the groundwork for the innocent explanation test applied herein. The court wrote:

> Although the observed acts of the defendant and the suspected narcotic addict were not inconsistent with a culpable narcotics transaction, they were also susceptible of many innocent interpretations, even between persons with a narcotics background . . .
>
> 24 N.Y. 2d at 423-425, 248 N.E. 2d at 868, 301 N.Y.S. 2d at 20.

Thus, the innocent interpretation concept began to take form. That concept was a logical extension of the earlier holding of *People* v. *Corrado*, 22 N.Y. 2d 308, 239 N.E. 2d 526, 292 N.Y.S. 2d 648 (1968) wherein an arrest was invalidated primarily because observed manila envelopes, although the primary means of marijuana distribution, have many innocent functions as well.

In any event, there followed the case of *People* v. *Russell*, 34 N.Y. 2d 261, 313 N.E. 2d 732, 357 N.Y.S. 2d 415 (1974). There, officers received confidential information that the defendant was selling narcotics at a certain location. He was later observed at the described place, standing at the driver's side of an automobile in conversation with its two occupants. Just prior to the car's departure,

the defendant made a motion with his hand which, according to the officers, had been empty throughout the period of their observation. The car then left, and the officers approached and questioned the defendant. They soon found a manila envelope containing heroin, lying on the street at a spot over which the car had been parked. The defendant was arrested and charged with the possession of the drug.

The Court of Appeals invalidated the arrest since there was nothing to connect the defendant with the narcotics except the confidential information that he was selling drugs. However, taking the opportunity to expound on the innocent interpretation test, the court, citing *Brown*, wrote:

> To put it another way, if the same sketchy pattern as herein described occurs just as frequently or even more than frequently in innocent transactions, the pattern is too equivocal to form the basis for such warrantless arrest.
>
> 34 N.Y. 2d at 264, 313 N.E. 2d at 734, 357 N.Y.S. at 418.

While *Russell* was not incorrectly decided, the language it employed invited the departure from proper constitutional interpretation that was to be made in the case at bar. It suggested that a suspect's conduct should be viewed in the abstract. It seemed to deny that certain conduct, which in itself would be consistent with innocence, would become strongly indicative of guilt to a trained officer observing it in the light of surrounding circumstances. In so holding, the Court of Appeals set out on a path leading away from the essence of the constitutional concept of probable cause, *viz.*, probabilities.

That path was followed when the Court of Appeals applied the innocent interpretation doctrine to the facts at bar. Unlike in *Russell*, however, the result here was inconsistent with federal constitutional law.

In this case, an officer trained in the detection of narcotics offenses observed a reputed drug dealer, in a narcotics infested area, in the possession of a woman's purse which contained glassine material, believed by the officer to be glassine envelopes of the type used in heroine trading. At the approach of the uniformed officer, the suspect passed the purse, which he had held as his own throughout the five or ten minute period of the officer's observation, to another not apparently connected with him.

The question faced by the reviewing courts was whether or not, in acting as he had, Hackett had performed as a reasonable and prudent police officer. Five justices on the Appellate Division bench, apparently not anticipating the holding later made in *Russell*, unanimously ruled that he had.* They found that six factors had combined to provide the officer with probable cause to arrest:

> (1) a neighborhood with a high incidence of crime, with drug traffic a major factor; (2) the defendant's local reputation as a dealer in dangerous drugs; (3) the 'somewhat unusual' possession by a man of a woman's purse . . . ; (4) an experienced police officer's observation of glassine envelopes of the type commonly used in drug traffic . . . ; (5) the same officer's belief that the envelopes contained dangerous drugs . . . ; and (6) the rapid transfer of the purse to a woman nearby upon the approach of the uniformed officers.
>
> 44 App. Div. 2d at 285, 354 N.Y.S. 2d at 671-672 (see Appendix C, *infra*).

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* As explained in the opinion of the Appellate Division (see Appendix C *infra*), the hearing court granted the suppression motion, purely on its erroneous interpretation of certain dicta in *Corrado, supra*. The Court of Appeals, in reinstating the suppression order, however, made no reference to that dicta.

The Court of Appeals, however, reversed. In reviewing the "undisputed" facts, it neglected to mention the information Hackett had received regarding the Respondent.* In its recitation of the applicable law, the court chose not to make mention of the effect on the case of the neighborhood's high incidence of drug-related crime or the officer's training and experience.

Instead, it focused entirely on respondent's conduct which it described in one sentence: "Here, the defendant held a small purse, opened the zipper part way, took matches therefrom and handed the purse to a woman." 36 N.Y. 2d at 282, ——N.E. 2d at——, 367 N.Y.S. 2d at 258. (See Appendix D. *infra.*)

Hackett's observations were entirely discounted. The court wrote, "The residue of the police officer's testimony that what he first described as glassine envelopes could have been the wrapper of a Hershey bar, insofar as he was not able to distinguish between the two, tests out as an equivocal observation at most." 36 N.Y. 2d at 282, ——N.E. 2d at——, 367 N.Y.S. 2d at 258 (the court here apparently chose to ignore what defense counsel below had correctly suggested—that the inside wrappers of candy bars are also made of glassine paper).

Finally, the court revealed the true basis of its holding. Citing *Corrado, Brown* and *Russell,* it applied the newly developed standard to the facts at bar. The court ruled:

> [Respondent's] actions are susceptible of innocent explanation, *since he may have been handed the purse to find a match or take a piece of chocolate therefrom and then return the purse to the owner.*

* Should this Court grant certiorari herein, it would of course not be bound by the Court of Appeals' failure to weigh this factor. See, e.g., *Beck* v. *Ohio,* 379 U.S. 89, 100 (1964) (Harlan, J., dissenting).

> 36 N.Y. 2d at 282, ——N.E. 2d at——, 367 N.Y.S. 2d at 258. (See Appendix D *infra*) (Emphasis supplied).

Thus, the court held that Hackett should have speculated that perhaps before he noticed the reputed drug dealer, the latter had borrowed the purse to remove matches or chocolate therefrom; that he had delayed in taking what he wanted for the next five or ten minutes; and that his decision to return the purse to its rightful owner had been made only coincidentally at the moment of the uniformed officer's approach. That such a requirement imposed upon a trained officer is entirely unreasonable needs, in our view, little argument.

Perhaps an examination of one illustrative case will demonstrate both the unreasonableness of the standard and the fact that its application puts New York at odds with other jurisdictions on this vital constitutional question.

In *United States* v. *Brown, supra,* 463 F. 2d 949 (D.C. Cir. 1972), an officer was on patrol in an area wherein he had frequently observed what appeared to be narcotics transactions. He saw the appellant, whom he did not know, and another standing in a phone booth, not using the phone. His suspicions aroused, the officer approached the appellant and identified himself. He noticed that the appellant's eyes appeared to be glassy and concluded, on the basis of his experience, that the appellant was "high." The officer then saw protruding from the appellant's shirt pocket, a cream colored envelope of the type in which he had found narcotics on previous occasions. He seized the envelope, examined its contents and found 145 capsules containing a white powder later identified as heroin. An arrest was then made.

The court held that the seizure would be proper only if at the moment it was made, there was sufficient probable cause to warrant the appellant's arrest. The court then wrote:

> We conclude that [the officer] had probable cause to arrest appellant at the time he removed the envelope from the latter's pocket.
>
> A combination of four factors was sufficient to lead [the officer] reasonably to believe that a narcotics offense was being committed by appellant. First the place was "an area in which the police know that narcotics offenses frequently occur. . . ." Second, appellant's eyes were glassy, indicating to a person with the officer's experience that he was an addict who had possessed narcotics in the recent past. Third, appellant's conduct with respect to the telephone booth was unusual, and raised the possibility that he was using the booth to traffic in narcotics or to shield himself while injecting narcotics. Fourth, and most important, the envelope protruding from appellant's shirt pocket was of the exact type in which [the officer] had previously found narcotics.
>
> Standing alone, any one of these four factors would likely be insufficient to justify an arrest. Together, however, they raised a reasonable probability, if not a certainty that appellant had contraband narcotics in his possession. Probable cause requires no more. 463 F. 2d at 950.

While there are some differences between *Brown* and the instant case, *Brown* is certainly no stranger. Although Brown was thought to be "high" at the time of his arrest, he did not enjoy the Respondent's drug connected reputation. Nor are cream colored envelopes in general as closely

related to drug traffic as is glassine material. Finally, Brown, unlike the Respondent, took no furtive action at the officer's approach.

We submit therefore that had the case at bar arisen in the District of Columbia, probable cause would have been found. Indeed were *Brown* to arise today in New York, there is little doubt as to how it would be decided.

The Court of Appeals would surely hold that Brown's glassy eyes were equally consistent with his running a fever as with his drug intoxication. The cream colored envelopes could have contained medicine for his illness. His presence in the phone booth could easily be explained since he might have been waiting to make a call.

It is clear that, by requiring that police officers, before acting, search their minds for any innocent interpretation of the conduct with which they are faced and disregard surrounding circumstances which their experience tells them is highly relevant, the Court of Appeals of New York has imposed an unjustifiable burden upon them. In times such as these, unwarranted restrictions that make law enforcement officers uncertain of their authority and hesitant in their actions in defense of society are simply unacceptable.

The Constitution requires no more than that officers act reasonably and prudently. If New York desires to impose stricter guidelines for its police, it may certainly do so. What it has done here is to impose, *under the banner of the Constitution,* more severe restrictions than the Constitution demands. This a State may not do. *Oregon* v. *Hass, supra,* —— U.S. ——, ——, 95 S. Ct. 1215, 1219 (1975).

"The police officer on the front line of the war against crime must make crucial decisions with little or no time for reflection or analysis." (*United States* v. *Jones,* 352 F.

Supp. 369, 379 [S.D. Ga. 1972] aff'd 481 F. 2d 1402.) He must be assured that the standard by which his actions will be measured is both comprehensible and reasonable.

With the case at bar, New York has destroyed the constitutional rule of reasonability. We now ask the Supreme Court to restore that rule to this State. We submit that by reviewing the judgment below, this Court can once again demonstrate to New York, and to the nation, that indeed, "[t]here is no war between the Constitution and common sense." *

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* *Mapp* v. *Ohio*, 367 U.S. 643, 657 (1961).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals of New York should be granted.

Dated: Brooklyn, New York
June, 1975

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

STEVEN W. FISHER
Assistant District Attorney
of Counsel

APPENDIX A

Order Appealed From

At a Trial Term, Part E of the Centralized Narcotic Part held in and for the County of New York, on the 5th day of March, 1973.

Present:
HON. AARON E. KOOTA, *Justice.*

THE PEOPLE OF THE STATE OF NEW YORK,

against

RITSO DAVIS,

Defendant.

The defendant having moved this Court for an Order suppressing evidence, and of any information obtained therefrom and suppressing the use of said evidence upon the trial of the above-named defendant and the issues raised by said motion having been duly heard and tried before this court on the 19th day of January, the 1st day of February, and the 5th day of March, 1973.

Now on all the evidence adduced before the Court on the trial of the issues raised by said Motion, and due consideration having been had, and the Court having rendered its decision in writing, it is

ORDERED, that the said Motion be granted, and it is further

ORDERED, that the District Attorney of Kings County be and is restrained and precluded from using, upon the trial of the above-named defendant any of the said evidence, to wit 18 glassine envelopes including contents and a purse.

Enter,

AARON E. KOOTA
Justice of the Supreme Court

Dated: New York, New York
March 12, 1973

APPENDIX B

Order of Reversal of the Appellate Division

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 22, 1974.

HON. JAMES D. HOPKINS
Acting Presiding Justice,
HON. M. HENRY MARTUSCELLO
HON. HENRY J. LATHAM
HON. JOHN P. COHALAN, JR.
HON. A. DAVID BENJAMIN
Associate Justices

—o—

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

against

RITSO DAVIS,
Respondent.

—o—

In the above entitled cause, the above named The People of the State of New York, plaintiff, having appealed to this court from an order of the Supreme Court, Centralized Narcotic Part in New York County, in a Kings County case, dated March 12, 1793, which granted defendant's motion to suppress certain evidence; and the said appeal having been argued by Steven W. Fisher, Esq., of counsel for the appellant, and argued by Robert B. Sherman, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon opinion by Cohalan, J. and this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the order appealed from is hereby unanimously reversed, on the law, and motion denied.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX C

Opinion of the Appellate Division, Second Department

—o—

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

v.

RITSO DAVIS,
Respondent.

—o—

Second Department, April 22, 1974.

Crimes—arrest—probable cause—in neighborhood with high incidence of crime, particularly drug traffic, experienced officer observed defendant, who had reputation as dealer in dangerous drugs, standing in street, holding woman's purse, and, when defendant opened it, officer saw what he suspected to be glassine envelope inside it—upon approach of officer, who was in uniform, defendant passed purse to woman and officer seized it, and placed defendant and woman under arrest—eighteen glassine envelopes were found in purse—defense motion to suppress should have been denied—totality of various factors added up to probable cause for officer to arrest defendant.

A uniformed officer, who had had training in the recognition and packaging of heroin, had made 5 to 10 arrests involving heroin, and had assisted in some 25 others, observed defendant standing in the street, about 10 feet from him, holding a woman's purse in his hand. The officer knew defendant by name and, on the basis of statements made to him by other officers and by residents of the neighborhood,

Appendix C

Opinion of the Appellate Division,
Second Department

The order should be reversed, on the law, and the motion to suppress denied.

The undisputed facts reveal that on August 25, 1972 at about 6:30 P.M. a uniformed New York City Housing Department policeman (Hackett) was conversing with a uniformed fellow officer in front of their office in Brooklyn. The neighborhood was considered a high crime area.

An unrelated arrest had just been made and a small crowd had gathered near the police office. Hackett observed Davis standing in the street about 10 feet from him. He knew him by name; and, on the basis of statements made to him by neighborhood residents and police officers, he believed him to be a dealer in dangerous drugs. Hackett noticed that Davis was holding in his hand a woman's polka dot purse with a zipper top. While under observation, Davis unzipped the purse halfway and withdrew matches. The police officer and his colleague moved nearer to Davis. As they closed the gap between them Hackett saw what he took to be glassine envelopes inside the opened purse.

Hackett's training had included a brief course in the department regarding the recognition and packaging of heroin. In service he had made between 5 and 10 arrests involving heroin and had assisted in some 25 others. In most of these cases the heroin had been packaged in small glassine envelopes.

Davis suddenly passed the purse to a woman standing nearby who accepted it without comment. Hackett had kept the purse itself under continuous observation. He and his colleague now moved in, seized the purse and put both the woman and Davis under arrest. The contents of the purse were revealed to be, *inter alia*, 18 glassine envelopes.

Appendix C

Opinion of the Appellate Division,
Second Department

one with a high incidence of crime, particularly drug traffic, believed him to be a dealer in dangerous drugs. Defendant unzipped the purse halfway and, as the officer moved nearer to him, he saw inside it was he suspected to be a glassine envelope, although it might have been a candy bar wrapper. Defendant suddenly passed the purse to a woman standing nearby, who accepted it without comment, and the officer moved in, seized the purse, and placed defendant and the woman under arrest. Eighteen glassine envelopes were found in the purse. A defense motion to suppress should have been denied. The totality of the various factors involved added up to probable cause for the officer to arrest defendant.

Appeal from an order of the Supreme Court at a Trial Term of the Centralized Narcotic Part, New York County (Aaron E. Koota, J.), dated March 12, 1973 and made in a Kings County case, which granted defendant's motion to suppress certain contraband evidence.

EUGENE GOLD,
District Attorney (*Steven W. Fisher* of counsel),
for Appellant.

WILLIAM E. HELLERSTEIN
and
WILLIAM J. GALLAGHER
(*Robert B. Sherman* of counsel),
for respondent.

COHALAN, *J.* The Trial Term entered an order granting the motion of defendant, Davis, to suppress certain contraband from being received in evidence and the People appeal.

Appendix C

Opinion of the Appellate Division,
Second Department

In passing, it should be noted that no charges were preferred against the woman, due to insufficient evidence.

At the suppression hearing—under cross-examination—a question was put to Hackett: "Q. Could you tell whether this was a candy wrapper?", to which he answered: "A. It appeared to be a glassine envelope," and shortly after, other questions on the subject were propounded by the cross-examiner and answered as follows:

> "Q. But there's no way that you or—you couldn't see whether or not it was a glassine envelope or a wrapper, could you? A. I couldn't distinguish the two at that time, but it appeared to me to be glassine envelopes or the wrapper of a Hershey bar.
>
> "Q. In other words, you suspected this was a glassine envelope?" A. Yes."

Of interest at this point as analogous to Hackett's alternative of glassine envelopes or a candy wrapper is the statement in *People* v. *Butterly* (25 N Y 2d 159, 162-163) a case involving the issue as to whether certain police actions constituted routine surveillance or an illegal arrest: "Assuming that the officers did not initiate their conduct with an illegal arrest, there would be probable cause for the later seizure and arrest. *Although Detective La Briola admitted he could not distinguish barbiturates from vitamin pills, he believed the capsules placed on on the floor by defendant to be barbiturates. This was not unreasonable.* The defendant, his attention first being drawn to the police officer knocking on the window to his right, was then observed placing the three capsules on the floor with his left hand. Such conduct under such circumstances could be

Appendix C

Opinion of the Appellate Division,
Second Department

significant evidence of consciousness of guilt. La Briola was, therefore, entitled to infer that contraband was being placed on the floor (compare, e. g., *People* v. *White,* 16 N Y 2d 270, cert. den. 386 U.S. 1008, with *People* v. *Brown,* 24 N Y 2d 421)" (emphasis supplied). As to initial inability to identify items as illicit drugs, see, also, *United States* v. *Robinson* (— U. S. — [94 S. Ct. 467, 471]).

In making its required findings of fact and law, the Trial Term found the testimony of Hackett to be completely credible. At first the motion to suppress was denied on the theory that probable cause had been established.

By the following day, however, the court had second thoughts and vacated its decision. In doing so, it requested the People to submit a memorandum in an attempt to distinguish the instant case and its facts from those of *People* v. *Corrado* (22 N Y 2d 308).

Then, on a subsequent date, after taking further testimony and hearing arguments of counsel, the court ruled: "On the principle of People against Corrado in 22 N. Y., The Court must find that officer Hackett did not have reasonable cause and probable cause to make a search and to arrest the defendant. The motion to suppress the evidence is granted." At the same time the court urged the District Attorney to take an appeal from its decision, in the thought that there was a principle of law involved which might affect other decisions.

Thus, the sole question at issue is whether the police officer had "reasonable cause" to believe the defendant had committed a crime in his presence, namely, the possession of dangerous drugs.

"Reasonable cause" has been equated with "probable cause" as the latter term is used in the Fourth Amendment

Appendix C

Opinion of the Appellate Division,
Second Department

to the United States Constitution (*People* v. *Lombardi*, 18 A D 2d 177, affd. 13 N Y 2d 1014).

In *Corrado* (*supra*), the police acted on a tip that a quantity of marijuana would change hands at a certain street corner between designated hours. They set up a stakeout and within the specified times a car pulled up. Three youths were in it. One got out, walked back to another car, momentarily bent down out of view of the watchers and then returned. He handed over four manila envelopes to his two companions, talked with them for a short while and then walked away. As the first car started to drive off, the police moved in and arrested the two young men. Upon inspection the manila envelopes were discovered to contain marijuana.

As justification to support "probable cause", one of the detectives testified that in his broad experience he had never seen loose marijuana in small quantities passed or sold other than in envelopes such as those involved.

The Court of Appeals, by a bare majority vote, reversed and suppressed the seized material, stating (22 N Y 2d 308, 313): "The argument is defective because the envelopes could have contained any number of noncontraband items. This is in sharp contrast to the translucent glassine envelope which has come to be accepted as the telltale sign of heroin. Still, even in the case of the glassine envelope it has never been held that the mere passing of such an envelope establishes probable cause. We conclude, therefore, that the testimony concerning the use of these common envelopes for marijuana does not raise the level of inference from suspicion to probable cause." At the same time the Court of Appeals intimated that, if the young men had

Appendix C

Opinion of the Appellate Division,
Second Department

made an attempt to flee when the officers identified themselves, the result might have been different.

The intimation brings us to *People* v. *Santiago* (28 N Y 2d 753). There, as a police officer testified at a suppression hearing, he observed Santiago and another man exit from a building. They "looked suspicions" so he "just looked at them" (*id.*, p. 754). They were only about five feet from and were facing the officer. The companion handed some glassine envelopes to Santiago. They were of the same type as envelopes containing heroin the officer had taken from another person the day before. The officer approached Santiago and identified himself. The defendant bolted, all the while holding onto the envelope. When caught he handed to the officer a paper bag containing hypodermic needles, among other items.

The motion to suppress was denied. In due course, when the case reached the Court of Appeals, the defense argued that, since the officer had observed only the transfer of glassine envelopes, he had acted without probable cause. This argument was met by the People with the counter-statement that the passing of the envelopes, combined with flight, constituted probable cause. The Court of Appeals affirmed, without opinion.

By way of establishing a working criterion, the highest court in the land, in *Brinegar* v. *United States* (338 U. S. 160, 175-176, rehearing den. 338 U. S. 839), noted: " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' * * * And this 'means less than evidence which would justify condemnation' or conviction * * *: Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge

Appendix C

Opinion of the Appellate Division, Second Department

and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed.''

While any one of the factual circumstances in the case at bar, standing alone, would have been insufficient to justify an arrest, when taken together, we have: (1) a neighborhood with a high incidence of crime, with drug traffic a major factor; (2) the defendant's local reputation as a dealer in dangerous drugs; (3) the ''somewhat unusual'' possession by a man of a woman's purse (see *People* v. *Lakin*, 21 A D 2d 902, 903, where the comment was made by the majority in a case wherein the results of an arrest were suppressed); (4) an experienced police officer's observation of glassine envelopes of the type commonly used in the drug traffic (*People* v. *Santiago*, 28 N Y 2d 753, *supra*); (5) the same officer's belief that the envelopes contained dangerous drugs (*People* v. *Butterly*, 25 N Y 2d 159, *supra*); and (6) the rapid transfer of the purse to a woman nearby upon the approach of the uniformed officers.

The totality of these factors, therefore, adds up to sufficient justification for police officer Hackett's actions and thus warrants a reversal of the order under review, on the law, and a denial of the motion to suppress the evidence in question.

Hopkins, Acting P. J., Martuscello, Latham and Benjamin, JJ., concur.

Order reversed, on the law, and motion denied.

APPENDIX D

Opinion of the Court of Appeals

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The People of the State of New York,
Respondent,

v.

Ritso Davis,
Appellant.

———o———

Argued February 12, 1975; decided March 26, 1975.

Crimes—unlawful search and seizure—arrest—patrolman did not have probable cause to make search and arrest defendant whom he had observed holding a woman's purse which appeared to contain glassine envelope; defendant's activities were susceptible of innocent interpretation; testimony of patrolman that what he described as glassine envelope could have been candy wrapper was equivocal observation.

A uniformed housing patrolman, while conversing with a fellow officer on the sidewalk in a high crime area where there had been complaints and arrests with respect to dangerous drugs, observed defendant holding a woman's purse. Defendant had opened the zipper halfway and had withdrawn matches. Upon moving closer the patrolman had seen what appeared to be a glassine envelope in the purse. After defendant had handed the purse to a woman, they were both arrested and a search of the purse revealed 18 glassine envelopes containing heroin. The Supreme Court properly granted a motion to suppress on the ground that the patrolman did not have probable cause to make a search and arrest

Appendix D

Opinion of the Court of Appeals

defendant. Defendant's activities were susceptible of an innocent interpretation. Defendant may have had the purse to find a match or take a piece of candy, a finding of a "rapid transfer of the purse" was unsupported in the record, and the patrolman's testimony that what he described as a glassine envelope could have been a candy wrapper was an equivocal observation.

People v. *Davis*, 44 A D 2d 281, reversed.

Appeal, by permission of the Chief Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 22, 1974, which (1) reversed, on the law, an order of the Supreme Court at a Trial Term of the Centralized Narcotic Part, New York County (AARON E. KOOTA, *J.*), made in a Kings County case, granting a motion by defendant to suppress certain evidence, and (2) denied said motion.

Robert B. Sherman and *William E. Hellerstein* for appellant. The hearing court was correct in deciding that the Fourth Amendment was violated by the warrantless search of appellant predicated upon Officer Hacketts' desire to determine whether the glassine material he had observed in appellant's possession was a Hershey bar wrapper or a glassine envelope. (*People* v. *Brown*, 24 N Y 2d 421; *People* v. *Corrado*, 22 N Y 2d 308; *Sibron* v. *New York*, 392 U. S. 40; *People* v. *Loria*, 10 N Y 2d 368; *People* v. *Harmon*, 42 A D 2d 941; *People* v. *Verrecchio*, 23 N Y 2d 489; *People* v. *Lakin*, 21 A D 2d 902; *People* v. *Butterly*, 25 N Y 2d 159; *People* v. *White*, 16 N Y 2d 270; *People* v. *Smith*, 21 N Y 2d 698.)

Appendix D

Opinion of the Court of Appeals

Eugene Gold, District Attorney (*Steven W. Fisher* of counsel), for respondent. The seizure of the contraband herein was incidental to a lawful arrest and therefore properly executed. (*People* v. *Lombardi*, 18 A D 2d 177, 13 N Y 2d 1014; *United States ex rel. Lupo* v. *Fay*, 332 F. 2d 1020, 379 U. S. 983; *United States ex rel. Foreman* v. *Casseles*, 311 F. Supp. 526; *Brinegar* v. *United States*, 338 U. S. 160, 839; *Henry* v. *United States*, 361 U. S. 98; *Draper* v. *United States*, 358 U. S. 307; *People* v. *White*, 16 N Y 2d 270, 386 U. S. 1008; *People* v. *Santiago*, 13 N Y 2d 326; *United States* v. *Chaplin*, 427 F. 2d 14, 400 U. S. 830; *People* v. *Abdelah*, 41 A D 2d 667.)

COOKE, *J.* The facts are undisputed.

Hackett, a uniformed patrolman of the Housing Department Police, was conversing with a fellow officer on the sidewalk in front of their office on Marcy Avenue, Brooklyn, a high crime area where there were complaints and arrests for dangerous drugs, when he observed defendant about 10 feet distant, holding a woman's red and white polka dot purse, about two by three inches in size with a zipper top. Defendant opened the zipper halfway and withdrew matches. The officers moved to within three feet of defendant when Hackett saw what appeared to be glassine envelopes in the purse. On cross-examination, Hackett, when asked "you couldn't see whether or not it was a glassine envelope or a candy wrapper, could you?", responded "I couldn't distinguish the two at that time, but it appeared to me to be glasine [*sic*] envelopes or the wrapper of a Hershey bar." As Hackett continued his approach, defendant handed the purse to a woman who accepted it without

Appendix D

Opinion of the Court of Appeals

comment. Defendant and the woman were arrested and a search of the purse revealed 18 glassine envelopes containing a white powder, later found to be heroin. Hackett had some experience with heroin arrests and had taken a brief course regarding the recognition and packaging of the substance. Supreme Court granted the motion to suppress, stating that the policeman was able to see only glassine envelopes but not their contents and holding that he did not have probable cause to make a search and to arrest defendant. The Appellate Division reversed, on the law, finding that the totality of the surrounding circumstances formed a sufficient justification to warrant Hackett's actions.

Where the observed acts of the defendant were susceptible of various innocent interpretations, even if involving a person with a narcotics background, where the behavior was at most equivocal and suspicious, and where there was no supplementation by any additional behavior raising the level of inference from suspicion to probable cause, more must be shown to form the basis for a warrantless arrest and an incidental search (*People* v. *Russell,* 34 N Y 2d 261, 264; *People* v. *Brown,* 32 N Y 2d 172, 174; *People* v. *Brown,* 24 N Y 2d 421, 423; *People* v. *Corrado,* 22 N Y 2d 308, 311, 313).

This is not a case where, as in *People* v. *Lakin* (21 A D 2d 902), defendant was walking and carrying a woman's pocketbook under his arm. But, even there, the court said that the "carrying of a woman's pocketbook by a man, though somewhat unusual, is not criminal behavior or sufficient basis for a finding of probable cause". Here, defendant held a small purse, opened the zipper part way, took matches therefrom and handed the purse to a woman. Certainly this is activity readily susceptible of an innocent

Appendix D

Opinion of the Court of Appeals

interpretation. The finding below of a "rapid transfer of the purse" is unsupported in the record. The residue of the police officer's testimony that what he first described as glassine envelopes could have been the wrapper of a Hershey bar, insofar as he was not able to distinguish between the two, tests out as an equivocal observation, at most. Defendant's actions are susceptible of innocent explanation, since he may have been handed the purse to find a match or take a piece of chocolate therefrom and then return the purse to the owner.

The order of the Appellate Division should be reversed and the order of the Supreme Court, granting defendant's motion for suppression, should be reinstated.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler and Fuchsberg concur.

Order reversed and the order of Supreme Court, New York County, reinstated.